Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1688

JONAL CORPORATION,

Petitioner,

v.

DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

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v.

DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Jonal Corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 18, 1976, rehearing denied April 21, 1976.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit (App. A, *infra*, p. 1a; 14a; 15a dissenting in part) are not reported.

JURISDICTION

The opinions and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on March 18, 1976. Jonal's petition for rehearing and suggestion for hearing or rehearing *en banc* were denied by orders of April 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Contract Appeals Board, D.C., is an unfair tribunal contravening the Due Process Clause of the Fifth Amendment to the Constitution of the United States, when composed of two Assistants Corporation Counsel, D.C., selected and approved by the Corporation Counsel for the District of Columbia, and the third member of the Board appointed by the Corporation Counsel Chairman of the Board from certain D.C. Contracting Officers, mandated by a regulation of the District to hear and to determine mutual monetary claims of petitioner and the District growing out of a construction contract between them, which were defended and prosecuted for the District by another Assistant Corporation Counsel, D.C.?

2. Whether the judgment of the United States Court of Appeals for the District of Columbia Circuit sustaining a judgment of the District Court not only approving the Board's composition but also attributing finality to the Board's decision denying petitioner's claims for compensation for work alleged not to be called for by the construction contract—a legal

question—deprived petitioner of its property without due process of law in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States; and also was in violation of the Wunderlich Act, 41 U.S.C. 321 and 322, a due process statute?

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States:

> "* * * nor be deprived of his life, liberty, or property, without due process of law; * * *"

STATUTE OF THE UNITED STATES INVOLVED

The "Wunderlich Act," 41 United States Code, Sections 321 and 322:

> "§ 321. Limitation on pleading contract-provisions relating to finality; standards of review
>
> "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent[1] or

[1] So in original. Probably should read "fraudulent."

capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

"§ 322. Contract-provisions making decisions final on question of law

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199 § 2, 68 Stat. 81."

DISTRICT OF COLUMBIA CODE SECTION INVOLVED (1973 EDITION)

"§ 1-102. District created body corporate for municipal purposes.

"The District is created a government by the name of the 'District of Columbia,' by which name it is constituted a body-corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this Code. (R.S., D.C., § 2; June 11, 1878, 20 Stat. 102, ch. 180, § 1.)"

DISTRICT OF COLUMBIA REGULATION INVOLVED

Title 1 of the District of Columbia Code, Administration, Appendix (1973 edition), Organization Order No. 9, Commissioner's Order No. 68-399, dated June 6, 1968, as amended, Part VI, pages 234-235, provides:

"Part VI

"*Contract Appeals Board, D.C.*—A. There is established a Contract Appeals Board, D.C., consisting of one or more active or retired Assistant Corporation Counsel designated by the Corporation Counsel, one of whom shall serve as Chairman of the Board, and two or more persons appointed or designated by the Commissioner from among officers assigned to the Corps of Engineers and detailed to assist the Commissioner pursuant to Sec. 503(b) of Reorganization Plan No. 3 of 1967, or from among active or retired District of Columbia officers and employees who have had practical experience in the administration of government contracts. Except as otherwise provided by its rules, all business of the Board shall be conducted by panels of not less than three members at least one of whom shall be an active or retired Assistant Corporation Counsel member, but any two members of a panel shall constitute a quorum for the transaction of any business of the Board.

"No person shall serve as a member of a panel in the decision of any case in which the appeal has been taken from the action of a Contracting Officer or Alternate Contracting Officer of the department of which he is, or at the time of his retirement was, the Director of an employee, or in which he has participated directly in any aspect of the award or administration of the contract involved.

"B. The functions of the Contract Appeals Board shall be to hear, to review, and to decide upon all protests and appeals from actions by Contracting Officers where the Contracting Officer is unable to satisfy the Contractor that the action taken was a proper action, and such other contractual appeals, or classes thereof, as the

Commissioner may from time to time order. Upon request of the Contractor of the Contracting Officer, and with the consent of the other, the subject matter of an appeal shall be remanded to the Contracting Officer, who shall thereupon reconsider his appealed decision, and upon such remand the appeal shall be dismissed. The decision of the Contract Appeals Board in every case shall be final subject to such limitations and review as may be provided by law.

"C. The Contract Appeals Board is authorized to prescribe rules of practice and procedure, including the establishment of time limitations and the development of methods of perfecting appeals to it.

"D. The Chairman of the Contract Appeals Board shall, from time to time, assign members to panels of the Board, shall be responsible for obtaining the necessary secretarial assistance for the Board and for maintaining centralized custody over all records of the Board, and may, from time to time, designate a member to serve as acting chairman during his own absence, disqualification or disability.

"E. The activities of the Board shall be considered investigations or examinations of municipal matters within the meaning of the Act of July 1, 1902 (D.C. Code, 1967 ed., Sec. 1-237), and the members of said Board shall possess the powers vested in the Commissioners by said Act of July 1, 1902."

D.C. CONTRACT DISPUTES CLAUSE INVOLVED

"Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes

concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto, subject to the limitations of Sec 3(b)(2) of Reorganization Plan No. 5 of 1952. In the meantime the contractor shall diligently proceed with the work as directed."

STATEMENT

Following competitive public bidding and award, the District of Columbia and petitioner, Jonal Corporation, entered into a contract dated May 1, 1967, to construct two water pollution control plant supply buildings in accordance with the District's plans and specifications. During construction, the District required Jonal to perform work which the latter claimed was not called for by the contract, which was done by Jonal under protest. Petitioner submitted claims to the District for compensation for the asserted additional work and for extension of time, which were denied by the District's Contracting Officer, who also assessed liquidated damages against Jonal for alleged delay in completion. Jonal appealed therefrom to the District of Columbia Contract Appeals Board (App. A, *infra*, pp. 2a-3a; p. 15a).

On March 7 and 8, 1972, hearings were held before a three-man panel of the Contract Appeals Board. The members of the Board empanelled to hear the matter were Louis P. Robbins, Assistant Corporation Counsel for the District of Columbia; Lou Frana, Assistant Corporation Counsel for the District of Columbia, and Gerald I. Sawyer, a Contracting Officer employed by

the District of Columbia Department of Highways. Mr. Robbins and Mr. Frana were appointed by C. Francis Murphy, Chairman of the Contract Appeals Board for the District of Columbia and Corporation Counsel for the District of Columbia. Mr. Sawyer was appointed to the panel by Mr. Robbins. The counsel for the District of Columbia before the Board was James E. Lemert, assigned by Mr. Murphy to both defend the case and prosecute the District of Columbia's case against Jonal for liquidated damages. On February 16, 1973, the Board issued its findings of fact, conclusions of law, opinions and decisions denying petitioner's claims. (App. A, *infra*, pp. 3a-4a; p. 17a.)

Jonal filed suit in the District Court on April 7, 1973 to recover for the claimed extra work and for the deduction from the contract price of $9,600 for liquidated damages. The District answered and moved for summary judgment, asserting that Wunderlich Act standards applied and that the District Court's review was limited to whether the Board's decision was supported by substantial evidence. Jonal filed a Counter Statement of Undisputed Facts, together with Points and Authorities in Opposition to the District's Motion for Summary Judgment, contending that the trial court "must first decide whether Organization Order No. 9 establishing the Board and its constituency violates, on its face, the Due Process Clause of the Fifth Amendment to the Constitution of the United States." Also, Jonal contended "that the Board was so created as to be inherently tainted, allowing the District Court to review *de novo* the Board's decision." Jonal reserved the right to file additional material in opposition to the District's contentions about the limitation of the

District Court's review and the finality to be accorded the Board's decision after the above-mentioned issues were resolved (App. A, *infra*, pp. 4a-5a; pp. 15a-18a).

On November 27, 1973, the District Court issued and entered a memorandum and order holding that Jonal's constitutional claim "must fail for want of jurisdiction since the claim was not properly pleaded as a matter of form." The trial court held also that the standards of the Wunderlich Act were applicable; that "the reviewing court may not substitute its own independent judgment for that of the agency." Finally, the trial court held the District was entitled to summary judgment on the merits, stating:

> "After a review of the whole administrative record, the Court finds that the District of Columbia Contract Appeals Board's decision was based on substantial evidence, and was not arbitrary or capricious."

(App. A, *infra*, p. 5a; pp. 20a-21a; App. G, *infra*, pp. 46a-48a.)

There were three opinions of the panel of the Court of Appeals which heard and decided Jonal's appeal from the District Court's decision and judgment dismissing the complaint (App. A, *infra*, pp. 1a-13a; 14a; 15a-27a).

As to the constitutional issue regarding the composition of the Board, the opinion of District Judge Merhige was that the Court of Appeals need not reach such issue because Jonal's due-process contention was "lacking in substance" (App. A, *infra*, pp. 5a-6a).

The concurring opinion of Circuit Judge Robb was that Jonal, by signing the contract and by proceeding before the Board without objection, "waived any challenge it might have made." (App. A, *infra*, 14a).

Circuit Judge Leventhal's opinion, dissenting in part, did not accept the argument that Jonal was estopped to challenge the composition of the Board when petitioner did not raise the issue before the Board, because Organization Order No. 9 establishing the Board and its composition could not have allowed the Board "to remove the problem of domination by the Corporation Counsel of which plaintiff complained." (App. A, *infra*, pp. 25a-26a).

The opinion of Judge Merhige also held that the due-process standard "established" by *Marcello v. Bonds*, 349 U.S. 302 (1955), a deportation case, was not violated by the District through its Contract Appeals Board and that the grossly erroneous standard of the Wunderlich Act also had not been violated (App. A, *infra*, pp. 6a-10a; 10a-13a).

Judge Leventhal dissented from such conclusions of District Judge Merhige, stating that "the problem cannot be dismissed by saying that the same agency can combine prosecutorial and adjudicatory functions" and that "[t]here is an issue that requires ventilation as to how it works." Judge Leventhal would have required a hearing on remand to "flesh out the working relations of members of the Board to other employees in the Office of the Corporation Counsel, before he proceeds to decide whether and to what extent, its decisions are entitled to the benefit of the 'substantial evidence' rule" (App. A, *infra*, 24a-25a).

Judge Leventhal also disagreed with the reasoning by analogy from the deportation cases referred to in Judge Merhige's opinion and from the rule-making cases mentioned which followed such reasoning (App. A, *infra*, pp. 22a-23a).

Certain items of documentary evidence and 12 exhibits introduced in the hearing before the Board were not before the District Court when it rendered its summary judgment for dismissal of Jonal's complaint. The remand in District Judge Merhige's opinion was said to be "for the limited purpose of having the trial court file an amended and supplemental finding reflecting either that it had considered all documentary evidence and exhibits in reaching its conclusions or has, since remand, considered same and amends or affirms, as it deems appropriate, its judgment order." (App. A, *infra*, 13a). Judge Leventhal dissented in part from that remand, and would have required the trial court "to consider the questions identified in this opinion to determine whether *Wunderlich's* 'substantial evidence' rule is operative." (App. A, *infra*, p. 27a).

Jonal petitioned the Court of Appeals for a rehearing, considering that such Court, as well as the trial court, seemed to misconceive its function of determining the legal question whether Jonal was obliged to do, without additional compensation, work which was not called for by its contract and that both Courts seemed not to have applied the appropriate standards pertaining both to the raising and to the determination of the issue of depriving Jonal of its property without due process of law in violation of the Due Process Clause of the Fifth Amendment (App. B, *infra*, pp. 28a-37a).

Jonal also suggested hearing or rehearing *en banc* because of the prospective significance of the issues on the appeal in view of the recurrence thereof in the large procurement of the District continuing into the indefinite future (App. B, *infra*, pp. 36a-37a).

Both the petition and the suggestion were denied by the Court of Appeals under date of April 21, 1976 (App. C, *infra*, p. 39a; App. D, *infra*, p. 40a).

Jonal's motion to stay mandate pending application to the Supreme Court of the United States for a writ of certiorari was granted and the mandate stayed to and including May 27, 1976 (App. E, *infra*, p. 41a; App. F, *infra*, p. 43a).

REASONS FOR ALLOWANCE OF THE WRIT

1. Jonal was unconstitutionally deprived of its property by decision of a board whose composition violated the appearance and probability of due process, and due process itself by the courts below in giving essentially final effect to the board's decision denying Jonal's claims.

Withrow v. Larkin, 421 U.S. 35, 46, 47 (1975), re-emphasized *In re Murchison*, 349 U.S. 133, 136 (1955), that a "fair trial in a fair tribunal is a basic requirement of due process." Such "applies to administrative agencies which adjudicate as well as to courts" (421 U.S., at 46). "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness'" (*Withrow v. Larkin*, *supra*, 421 U.S., at 47, quoting in part from *In re Murchison*, 349 U.S., at 136). Cf. *American Cyanimid Co. v. FTC*, 363 F.2d 757 (CA 6, 1966), in which the Court vacated decision wherein one of the FTC Commissioners had previously served as counsel for a Senate Subcommittee investigating in essence much of the same case as before the Commission.

The Corporation Counsel is actively engaged in contract litigation and here "was at one and the same time both defending against Jonal's claim and prosecuting a claim of the District against Jonal for liquidated damages," so that Jonal was required, in substance and effect, to try its case before its adversary's lawyers, who could constitute a quorum[2] (App. A, *infra*, pp. 21a-22a).

Furthermore, "counsel for the District advised the [appellate] court at oral argument that the District considers itself free under its regulations to permit the Corporation Counsel not only to assign members of his staff to the board, but to make such assignment, on a part-time duty basis, in such a way that on one day a lawyer may be a member of the board, sitting as a judge in a case tried by another member of the staff of the Corporation Counsel, although the day before and the day after he may be working alongside that colleague, or even under his supervision, in another matter." (App. A, *infra*, p. 22a). Accordingly, *Withrow* does not support the conclusion made in District Judge Merhige's opinion; rather, *Withrow* supports Jonal's position on the lack of due process in the composition of the Board.

Moreover, Due Process within the scope of the Fifth Amendment Due Process Clause includes the appearance of justice and of impartiality. In *Offutt v. United States*, 348 U.S. 11, 14 (1954), Mr. Justice Frankfurter remarked that "[j]ustice must satisfy the appearance of

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[2] In the 2-day board hearing, Mr. Sawyer, the member who was not an Assistant Corporation Counsel, was present for only about three hours (App. A, *infra*, p. 17a).

justice." In paraphrase, the Court, in *NLRB v. Schwartz Brothers, Inc.*, 154 U.S. App. D.C. 342, 346, 475 F.2d 926, 930 (1973), said that "[i]mpartiality must satisfy the appearance of impartiality."[3]

The appearance of bias also embraces the appearance or probability of predisposition, inclination and conditioned reflex in favor of the District by a board composed as above described. The concept that constitutional due process includes the appearance of due process and of impartiality would be an empty one if actual bias for or against either party had to be shown.

In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), no charge of actual bias or of improper motives was made, and the Court remarked, in setting aside the arbitration award, that it should "be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."

Marcello v. Bonds, 349 U.S. 302 (1955), a deportation case, does not give validity to the composition of the D.C. Board of Contract Appeals, as

[3] See back cover of *Judicature*, the Journal of the American Judicature Society, for December 1973, Vol. 57, No. 5, on which these words appear: "'It .... is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' Lord Hewart, 1921."

Circuit Judge Leventhal pointed out in his dissenting opinion[4] (App. A, *infra*, pp. 22a-23a).

As to waiver of the due process claim of Jonal through its failure to raise the question before the Board, in the opinion of Circuit Judge Robb disagreed with by Circuit Judge Leventhal, and not reached in the opinion of District Judge Merhige, in *Fuentes v. Shevin*, 407 U.S. 67, 94-97 (1972), this Court specifically differentiated between an adhesion contract, wherein there was unequal power or overreaching, and the contract in *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), in which the contract was drafted by the parties' lawyers. In *Fuentes*, it was held there was no waiver under the adhesion contract. Here, there was a public letting by a municipal corporation, in which the bidder must take the bid as offered or lose it. Therefore, it may not be said that by signing the contract such bidder deserves the worst which may befall it.

Likewise, Jonal's complaint was not required to raise the constitutional question, as Circuit Judge Leventhal pointed out (App. A, *infra*, Part C, pp. 20a-21a; see also App. B, *infra*, pp. 29a-30a).

[4] "Deportation hearings have special tradition and requirements, due to exigencies of volume and location. Moreover, they are subject to a full administrative review by a national board of immigration appeals, staffed by members who are not subject to other assignment within the Immigation and Naturalization Service, and it is only that board's independent evaluation of the evidence that is entitled to 'substantial evidence' deference by the courts. In *Marcello*, the Court was able to thrust aside a claim that prejudgment affected the hearing inquiry by stressing that the board of immigration appeals and had been insulated (pp. 313-14)."

2. The due process provisions of the Wunderlich Act were likewise violated below.

Interacting and intertwined with the deprivation of Jonal's property through in effect the sanctioning as final of the decision denying the claims by the District's adhesion Board, is that the question whether the extra work the District required the contractor to perform at Jonal's expense was called for by the contract was a legal one as to which Jonal was entitled under the Wunderlich Act to the independent judgment of the District Court as falling under its original jurisdiction–and for that matter later, if necessary, the judgment of the Court of Appeals.[5] However, the trial court simply *found* that the Board's decision was not arbitrary or capricious and was based on substantial evidence (which was not even the test as to questions of law), and thereupon dismissed Jonal's complaint (App. G, *infra*, pp. 49a-50a).

The Court of Appeals in effect rested on the District Court's conclusion–in reality a finding–so that Jonal never has had and never will have that independent legal determination by the District Court or by a court of the proper construction or interpretation of the contract under the Wunderlich Act which both courts below and the District of Columbia agreed to be

[5] *Kayfield Construction Corp. v. United States*, 278 F.2d 217, 218 (2 Cir., 1960); *Kenny Construction Co. v. District of Columbia*, 105 U.S. App. D.C. 8, 262 F.2d 926 (1959); *C.J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F.2d 600 (1965); *Vann v. United States*, 190 Ct. Cl. 546, 420 F.2d 968 (1970); *Northwestern Industrial Piping, Inc. v. United States*, 199 Ct. Cl. 540, 467 F.2d 1308 (1972); *H & M Moving, Inc. v. United States*, 204 Ct. Cl. 696, 499 F.2d 660 (1974).

applicable to the Board's decision. The mandate of the Court of Appeals as ordered will simply result and indeed invites a perfunctory–almost self-executing–proceeding in the trial court (App. A, *infra*, p. 13a; App. B, *infra*, p. 31a).

Under the aegis of the decision and judgment of the Court of Appeals in Jonal, the District of Columbia will have full sanction in this and in all other contract claims of contractors with it to continue with its adhesion contracts and with its adhesion boards composed in majority by its lawyers in the Corporation Counsel's Office, in which those lawyers are both defending and prosecuting the parties' respective claims, unless this Court intervenes.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May 1976

EXHIBIT A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1191

JONAL CORPORATION, APPELLANT

v.

DISTRICT OF COLUMBIA

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action 656-73)

Argued June 16, 1975

Decided March 18, 1976

Judgment entered this date

John F. Myers, with whom *Kahl K. Spriggs*, was on the brief for appellant.

David P. Sutton, Assistant Corporation Counsel for the District of Columbia, with whom *C. Francis Murphy*, Corporation Counsel, *Louis P. Robbins*, Principal Assistant Corporation Counsel and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief for appellee.

Before: LEVENTHAL and ROBB, *Circuit Judges* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

Opinion for the Court filed by *District Judge* MERHIGE.

Concurring opinion filed by *Circuit Judge* ROBB.

Opinion filed by *Circuit Judge* LEVENTHAL, dissenting in part.

MERHIGE, *District Judge*: Appellant, a Maryland corporation doing business in the District of Columbia, takes this appeal from the summary judgment of the District Court holding that decisions of the District of Columbia Contract Appeals Board are subject to the limited scope of judicial review provided in the Wunderlich Act, 41 U.S.C. § 321-22 (1970). Jonal sought payment of $71,726.13 allegedly due for work done pursuant to a contract with the District of Columbia to build several water pollution control plant buildings.[1] Since the amount in controversy exceeds $50,000, jurisdiction was conferred on the District Court by *D.C. Code Ann.*, § 11-501(4) (1973).[2]

The facts, as appear in the record, are that following the completion of competitive bidding procedures, the District of Columbia, on April 13, 1967, awarded a contract for the construction of two water pollution control plant supply buildings to the appellant Jonal. The parties entered

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] The plaintiff seeks $6,491.00 for the construction of the two water pollution control plant buildings to a greater height than that called for in the plans and specifications, $25,635.13 for the performance of certain paving work not included in the plans and specifications, delay damages in the sum of $30,000, and $9,600 representing the unpaid balance due under the contract.

[2] This section has since been amended.

into a written contract on May 1, 1967 which incorporated by reference all the bid plans and specifications, and all the terms of the bid invitation. Article 15 of the contract contained the following provisions:

> Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto, subject to the limitation of Sec. 3(b)(2) of Reorganization Plan No. 5 of 1952. In the meantime the contractor shall diligently proceed with the work as directed.

After the appellant began work in accordance with the contract, disputes arose over the proper interpretation to be given various notes appearing on the contract drawings. Jonal Corporation claimed that it had not contracted to perform specified items of work,[3] but the contracting officer decided to the contra and directed Jonal to proceed with the execution of the contract. Jonal accordingly performed the work under protest, and then submitted claims for compensation to the contracting officer for the alleged additional work. The contracting officer denied the claims and Jonal appealed to the District of Columbia Contract Appeals Board pursuant to the procedure outlined in Article 15 of the contract.

On March 7 and 8, 1972 hearings were held before a three-man panel of the Contract Appeals Board. The members of the Board empanelled to hear the matter were Louis P. Robbins, Assistant Corporation Counsel for the District of Columbia,[4] Lou Frana, Assistant Corporation

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[3] Disputes arose over the interior height of the plant buildings, and certain paving work around the buildings.

[4] Mr. Robbins is presently Principal Assistant Corporation Counsel, District of Columbia.

Counsel for the District of Columbia, and Gerald I. Sawyer, a Contracting Officer employed by the District of Columbia Department of Highways. Mr. Robbins and Mr. Frana were appointed by C. Francis Murphy, Chairman of the Contract Appeals Board for the District of Columbia and Corporation Counsel for the District of Columbia. Mr. Sawyer was appointed to the panel by Mr. Robbins. The counsel for the District of Columbia before the Board was James E. Lemert, assigned by Mr. Murphy to both defend the case and prosecute the District of Columbia's case against Jonal for liquidated damages. On February 16, 1973, the Board issued its findings of fact, conclusions of law, opinions and decisions denying appellant's claims.

On April 4, 1973, appellant filed suit, giving rise to this appeal, against the District of Columbia to recover the costs, expenses and damages occasioned by the alleged modifications in the original contract specifications. The District of Columbia answered the complaint on April 27, 1973 and moved for summary judgment on June 19, 1973, contending that disputes arising out of contracts entered into by the District are reviewable under the standards prescribed by the Wunderlich Act, and that the Court's review was restricted to the question of whether decision of the Contract Appeals Board was supported by "substantial evidence." On July 5, 1973, the appellant filed a "Counterstatement of Undisputed Facts" and a statement of "Points and Authorities in Opposition to Defendant's Motion for Summary Judgment." In those papers Jonal contended that the Court must first decide whether Organization Order No. 9, establishing the Board and its constituency, violates, on its face, the Due Process Clause of the Fifth Amendment to the Constitution of the United States. In addition, the appellant argues that the Board was so created as to be inherently tainted, allowing the District Court to review *de novo* the Board's decision. Finally, the appellant noted that it "reserve(d)

the right to file supplemental points and authorities in opposition to defendant's arguments on the limitation of (the District) Court's review, and the finality to be accorded the ruling of the Contract Appeals Board, . . . after the issues raised by this pleading are resolved."

On November 27, 1973, the District Court issued its memorandum and order which are the subject of this appeal. The trial judge held that appellant's constitutional claim "must fail for want of jurisdiction since the claim was not properly pleaded as a matter of form." The trial judge also held that the Wunderlich Act's standards of review are applicable to the case and, in accordance with those standards, that the appellee was entitled to summary judgment on the merits. "After a review of the whole administrative record, the Court finds that the District of Columbia Contract Appeals Board's decision was based on substantial evidence, and was not arbitrary or capricious." Op. at 6.

The appellee argues, in support of the District Court's ruling, that the appellant's procedural due process claim was belatedly proffered and improperly pleaded. This position has some justification. The Contract Appeals Board was established in 1953 and its composition, function and authority have remained essentially unchanged since its inception. *See* Reorganization Order No. 29, pt. VII, D.C.C.E. § 1-App. II 125 (1966), effective September 17, 1953. *See also* Organization Order No. 9, pt. VI, D.C. CODE ANN. § 1-App. 235-36 (1973), effective June 6, 1968; Reorganization Plan No. 3 of 1967 § 303, 3 C.F.R. 345 (Comp. 1967), 5 U.S.C. App. 588 (1970). Yet, Jonal Corporation's constitutional objection to the Board's composition was not presented until after the contract containing the questioned grievance procedure had been knowledgeably executed in 1967 by its representative,[5] the administrative procedure had been completely

[5] The trial judge noted "Jonal is no stranger to government contracts. It secured the disputed contract through competi-

exhausted on the contract issues, the case had been filed and fully pleaded in the District Court, and the defendant had filed a motion for summary judgment. Since the constitutional defect is allegedly inherent in the grievance procedure, the plaintiff, in fairness, ought to have presented its position at an earlier stage of the process.[6] We need, however, not reach the issue of whether such a delay in presenting the claim operates to bar this Court from further considering the argument, for we conclude that the appellant's procedural due process contention is lacking in substance.

Jonal Corporation argues that since the Corporation Counsel of the District of Columbia, or his designated representative, appointed all the members of the panel, and since the counsel for the District of Columbia was the Corporation Counsel of the District of Columbia, represented by an Assistant Corporation Counsel, who was both defending the District of Columbia against Jonal's claim and prosecuting its claim for liquidated damages against Jonal, it was "being required to try its case before its adversary's lawyer." Br. 17.

In a matter involving a deportation proceeding, the Supreme Court held in *Marcello* v. *Bonds*, 349 U.S. 302 (1955), that due process was not violated by the super-

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tive bidding and pursued its dispute before the Board in full recognition of the fact that the contract disputes clause . . . required all disputes to be referred to the Board 'whose decision shall be final and conclusive upon the parties.'" Op. 3, fn. 3.

[6] Indeed, the trial judge held that the constitutional claim was improperly pleaded, and dismissed it under the authority of *Bell* v. *Hood*, 327 U.S. 678 (1946). Also in issue is whether Jonal, by failing to assert the constitutional defense at the administrative hearing, waived his right to present it to the District Court. *See SEC* v. *R. A. Holman & Co.*, 323 F.2d 284 (2d Cir. 1963).

vision of adjudicating officers by officials charged with investigating and prosecuting functions.

> As noted above, the only complaint which petitioner can urge concerning the hearing procedures in this case is the objection that the special inquiry officer was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions. Petitioner would have us hold that the presence of this relationship so strips the hearing of fairness and impartiality as to make the procedure violative of due process. The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation with the Congress may take into account in exercising its particularly broad discretion in immigration matters. 349 U.S. at 311.

The decision has an informative history. Prior to the *Marcello* case, the Supreme Court had interpreted the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq.*, to require the separation of administrative functions in deportation cases. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950). Six months thereafter, Congress expressly excluded deportation proceedings from specified sections of the Act so as to reinstate the proceedings suspended by the Supreme Court. Supplemental Appropriation Act of 1951, 64 Stat. 1068. In 1962 Congress enacted the Immigration Act, 8 U.S.C. § 1252, which specifically provided for various combinations of judicial, prosecutorial and investigative functions that seemingly ran counter to the Administrative Procedure Act. The Supreme Court in *Marcello* specifically held that the Immigration Act was intended by Congress to supersede the Administrative Procedure Act on the question of separation of functions, and denied the petitioner's claim of a

due process violation.[7] The case has consistently been interpreted to stand for the general proposition that the combination in administrative procedures of judging with prosecuting or investigating functions is not, *per se*, a denial of due process. *E.g.*, *American Telephone and Telegraph Co.* v. *F.C.C.*, 449 F.2d 439, 455 (2d Cir. 1971); *Kinsella* v. *Board of Education of Central School District No. 7*, 378 F. Supp. 54, 60 (W.D.N.Y. 1974); *Toney* v. *Reagan*, 326 F. Supp. 1093, 1099 (N.D.Cal. 1971); K. Davis, *Administrative Law Treatise* § 13.02, p. 1975 (1958); cf. *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 863 (2d Cir. 1970).

The Supreme Court only recently restated its position on the issue of combination of function in administrative agencies in a case involving a Wisconsin medical disciplinary board.

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. *Withrow* v. *Larkin*, 43 U.S.L.W. 4459, 4463 (U.S. April 16, 1975).

[7] The fact that deportation hearings by inquiring officers are subject to de novo review, and that the Wunderlich Act provides for limited review of the Contract Appeals Board decisions does not distinguish the *Marcello* opinion from this case. The due process requirements at the hearing level should not significantly fluctuate with the review standards. Review is not, nor should it be, a necessary requisite to affording a litigant his due process rights at the initial hearing.

Although *Withrow* is distinguishable on its facts from the present case—it involved a disciplinary board that had both instigated the investigative proceedings and later ruled in a full and contested hearing on the existence of misconduct—the case's pronouncement of the presumption in favor of impartiality in administrative hearings irrespective of some overlap of adjudicative, prosecutorial and investigative function provides guidance in the present case.

Obviously, if personal bias or prejudice is apparent in the conduct of the administrative proceedings, there may well be grounds for the reversal of the administrative determination if the objection is timely brought. *See NLRB* v. *Washington Dehydrated Food Co.*, 118 F.2d 980 (9th Cir. 1941). Similarly, administrative decisions made by adjudicators with a pecuniary interest in the results of the proceeding may suffer reversal. *Cf. Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). However, the instant appellant has not advanced at any stage in these protracted proceedings, any claims of personal bias or pecuniary interest on the part of the membership of the Contract Appeals Board.

In conclusion, due process principles enunciated in *Marcello* v. *Bonds*, *supra*, controls us as to the constitutional issue. In the absence of evidence of actual personal bias or pecuniary interest, we hold that the fact that the Board membership was appointed by the Corporation Counsel, and the fact that the Corporation Counsel was also responsible for appointing an individual to prosecute and defend the case on behalf of the District of Columbia before the Board, does not, *per se*, constitute a violation of the due process clause of the Fifth Amendment.

Appellants also argue that the constituency of the Contract Appeals Board excepts the Board's decisions from

the limited review provisions of the Wunderlich Act. 41 U.S.C. §§ 321-22 (1970). The Act refers to "any contract entered into by the United States," 41 U.S.C. § 321, and has been applied by this Circuit to contracts entered into by the District of Columbia. *Kenny Construction Co.* v. *District of Columbia*, 262 F.2d 926 (1959). *See also, District of Columbia* v. *Heman Ward, Inc.*, 261 A.2d 836 (D.C. Ct.App. 1970). However, the Act expressly excepts certain decisions from its limited review provisions.

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.* 41 U.S.C. § 321 (Emphasis added).

Appellants argue that the formation of the Board by appointment of the Corporation Counsel should lead this Court to conclude that the Board's decision was "capricious or arbitrary or so grossly erroneous as to imply bad faith."

The terms "arbitrary" and "capricious" are typically associated with constitutional due process standards. *See Wickard* v. *Filburn*, 317 U.S. 111, 129 (1942); *Nebbia* v. *New York*, 291 U.S. 502, 525 (1933). Accordingly, the Court interprets the standard intended to be established by the use of those terms to be the appropriate constitutional due process standard. To hold otherwise would be to engage in subtle definitional exercises that are confusing and of questionable historical origin. Since the constituency of the Board does not violate the constitutional due process standards set out in *Marcello*, it did not render a decision on the controversy in issue that, without further evidence, can be said to be arbitrary or capricious.

Similarly, although due process discussions do not typically include the "so grossly erroneous as necessarily to imply bad faith," standard,[8] it would be difficult to hypothecate an administrative adjudication that both violates this standard and yet is within the constitutional boundaries set by the due process clause. Appellants assert that the grossly erroneous standard should be interpreted in light of the Court of Claims discussion in *Penner Installation Corporation* v. *United States*, 89 F. Supp. 545, 548 (Ct. Cl. 1950) *aff'd by equally divided Court*, 340 U.S. 898 (1950):

> So, if in any case we say that the contracting officer has not acted in good faith, we mean only that he has not in good faith discharged his duties as an impartial, unbiased judge. We do not at all mean to impugn his fidelity to his employer. Indeed, it is this fidelity to his employer that makes it so difficult for him to act impartially . . .
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> In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows,

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[8] The language of the statute itself would seem to imply that an application of the grossly erroneous standards involves an assessment of the actual decision of the Board in light of the evidence presented at the hearing. However, this Court will assume that the language is not so limited, and that it also goes to the validity of the procedural processes involved in the hearing.

and the duties his employment by one of them casts upon him.

Even if this Court were to adopt the standard of the *Penner* case, it would not support the appellant's position that the inherent composition of the Board necessarily imports a finding of bias in all of the Board's decisions. In *Penner*, the Court of Claims carefully analyzed the contracting officer's decision before finding actual bias.

> In view of his action on these three items, we are forced to conclude that he did not act with due regard to plaintiff's rights, that he did not act as an impartial, unbiased arbiter, and that his decisions, therefore, must be held to have been arbitrary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter. 89 F. Supp. at 549.

Penner does not stand for the proposition that a contracting officer's position, as an employee of the government, inherently biases his decisions. Rather it stands for the commonly accepted proposition that if actual bias is shown in a contracting officer's decision, the decision must be reversed. Furthermore, the Court in *Penner* clearly equates the good faith standard to the standard of arbitrariness and capriciousness. The other case noted by the appellants, *Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968), was premised on a finding of impropriety on the part of the decision maker because of his undisclosed financial ties to one of the litigants. There, one of the arbitrators had rendered substantial services for one of the parties to the dispute, and had not informed the other party of this relationship. The Court there held that the "undisclosed business relationship" required a reversal of the arbitration board's decision. "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the

parties any dealings that might create an impression of possible bias." 393 U.S. at 149. The instant case does not involve a non-disclosure problem; the appellants were fully aware when they signed the contract with the District of Columbia of the procedures and composition of the Contract Appeals Board. In conclusion, the grossly erroneous standard should also be equated with the constitutional due process standard. Since the due process standard established by *Marcello* has not been violated in the instant case, the Court concludes that the grossly erroneous standard similarly has not been violated.

Finally, the appellants argue that the District Court improperly determined that there was substantial evidence to support the Board's finding. It is alleged that certain items of documentary evidence and the twelve exhibits introduced during the hearings before the Contract Appeals Board were not before the District Court when it rendered its decision on the basis of the "whole administrative record." In the interests of justice, we conclude that the case should be remanded so that the District Court, if it has not already done so, may consider all pertinent parts of the administrative record, including the documentary evidence and exhibits aforementioned.

We deem it appropriate to point out that our remand is for the limited purpose of having the trial court file an amended and supplemental finding reflecting either that it had considered all documentary evidence and exhibits in reaching its conclusion or has, since remand, considered same and amends or affirms, as it deems appropriate, its judgment order.

* * *

ROBB, *Circuit Judge, concurring*: I concur in Judge Merhige's opinion and add a few words.

With full knowledge of the composition, functions and authority of the Contract Appeals Board the Jonal Corporation agreed by contract to submit disputes to the Board for decision. Thereafter without objection Jonal went to hearing before the Board. Only after the Board had rendered an adverse decision and Jonal had filed in the District Court its complaint for money due did the company question the composition of the Board. In these circumstances I think Jonal waived any challenge it might have made and that our decision might be rested upon that ground alone.

* * *

LEVENTHAL, *Circuit Judge*, dissenting in part: This is a contract case in which the plaintiff Jonal Corporation, a Maryland Corporation, which entered into a contract with the District of Columbia to build certain water pollution control plant buildings for $297,000, claims money due for work done.[1] The complaint was filed on April 4, 1973, at a time when a civil action filed in the District of Columbia, even between residents of the District, was within the exclusive jurisdiction of the United States District Court if the amount in controversy exceeded $50,000.[2]

On June 19, defendant District of Columbia, moved for summary judgment, setting forth that a dispute arose between the parties as to the interior height of the buildings, as called for by notes on certain contract drawings, and as to which party was to perform certain paving work, turning on the meaning of language in the revision block of another contract drawing; that after supplying the buildings and performing the work requested by the agents of the District, Jonal filed claims for an equitable adjustment of price and an extension of time; that these claims were denied by the Project's contracting officer; that plaintiff appealed to the District of Columbia Contract Appeals Board, was accorded a full evidentiary hearing, and that the Board upheld the decision of the Contracting Officer.[3]

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[1] Jonal alleges (a) it was required to erect two water pollution control plant buildings to a height allegedly higher than that called for by the specifications at a cost of $6,491: (b) it was required to do paving work not called for by the contract at a cost of $25,635.13: and (c) the additional work delayed final completion with a resulting extra cost of $30,000. Finally Jonal claims a $9,600 unpaid balance on the contract.

[2] D.C. Code Ann. § 11-501(4) (1973).

[3] Appeal No. 355 (building height claim), No. 356 (paved claim).

On July 5, 1975, the plaintiff filed a Counter-Statement of Undisputed Facts. This document referred to the Disputes clause of the contract[4] providing that disputes concerning questions arising under the contract shall be decided by the contracting officer, subject to appeal to the Contract Appeals Board, whose decision shall be final and conclusive; and in the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 12 of the Counter-Statement, quoted in the margin,[5] sets forth the organization of the Contract Ap-

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[4] "Article 15. Disputes—Except as otherwise specifically provided in this Contract, all disputes concerning questions arising under this Contract shall be decided by the Contracting Officer subject to written appeal of the Contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto, subject to the limitations of Sec. 3(b)(2) of Reorganization Plan No. 5 of 1952. In the meantime the Contractor shall diligently proceed with the work as directed." (App. 8)

[5] The Contract Appeals Board, D.C. was established on June 6, 1968 by Organization Order No. 9 of the then Commissioners of the District of Columbia, Title 1, District of Columbia Code, at 235-36 (1973 ed.), and provides in pertinent part as follows:

"PART VI

"*Contract Appeals Board, D.C.*—A. There is established a Contract Appeals Board, D.C., consisting of one or more active or retired Assistant Corporation Counsel designated by the Corporation Counsel, one of whom shall serve as Chairman of the Board, and two or more persons appointed or designated by the Commissioners from among officers assigned to the Corps of Engineers and detailed to assist the Commissioners pursuant to Sec. 503(b) of Reorganization Plan 3 of 1967, or from among active or retired District of Columbia officers and employees who have had practical experience in the administration of government contracts. Except as otherwise provided by its rules, all business of the Board shall be

peals Board under Organization Order No. 9 of the then Commissioners of the District of Columbia.

Paragraphs 13, 14 and 15 of the Counter-Statement set forth the members of the Board as follows: Louis C. Robbins, Assistant Corporation Counsel, as chairman; Lou Frana, an Assistant Corporations Counsel; and Gerald I. Sawyer, a contracting officer in the D.C. Department of Highways. "Mr. Sawyer attended only the morning session of the hearing on Appeal CAB, No. 355, although the hearing lasted almost two days." In these appeals counsel for the District of Columbia was James E. Lemert, assigned by the Corporation Counsel.

A Preliminary Statement filed by plaintiff—apparently along with the Counter-Statement—stated that the District's motion papers indicated it was attempting to limit the court's review to a "Wunderlich Act" review, whether

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conducted by panels of not less than three members at least one of whom shall be an active or retired Assistant Corporation Counsel member, but any two members of a panel shall constitute a quorum for the transaction of any business of the Board.

"No person shall serve as a member of a panel in the decision of any case in which the appeal has been taken from the action of a Contracting Officer or Alternate Contracting Officer of the department of which he is, or at the time of his retirement was, the Director or an employee, or in which he has participated directly in any aspect of the award or administration of the contract involved.

* * * * *

"D. The Chairman of the Contract Appeals Board shall, from time to time, assign members to panels of the Board, shall be responsible for obtaining the necessary secretarial assistance for the Board and for maintaining centralized custody over all records of the Board, and may, from time to time, designate a member to serve as acting chairman during his own absence, disqualification or disability."

there is substantial evidence in the record; that plaintiff submits that before the court decides whether review is so limited it must first decide plaintiff's contention that Order No. 9 violates the due process clause, and its further contention that Order No. 9 and the Contract Appeals Board, as constituted in CAB No. 355 and 356, also violates the provisions of the Wunderlich Act, 41 U.S.C. § 321. The Preliminary Statement concluded: "Plaintiff reserves the right to file a supplement opposing the claim of finality to be accorded the rulings of the Board in these cases after the issues raised by this pleading are resolved."

I

The first question is whether the principles of the Wunderlich Act apply so as to curtail judicial review in this case, and if so to what extent.

A

In general, dispute clauses in District of Columbia contracts are subject, in the same way as a Federal contract, to the Wunderlich Act principle.[6]

The contract provisions for finality of decisions of the Contract Appeals Board are not applicable as written, in that they are not conclusive as to questions of law, and are conclusive as to matters of fact if, and only if, they are supported by substantial evidence. Kenny Construction Co. v. District of Columbia, 105 U.S.App.D.C. 8, 262 F.2d 926 (1959); District of Columbia v. Heman Ward, Inc., 261 A.2d 836 (D.C.C. App. 1970).

Under this "substantial evidence" rule, the law of Government contracts has become assimilated to doctrines of administrative law. United States v. Carlo Bianchi & Co.,

[6] The Wunderlich Act, 41 U.S.C. § 321, is so named because it modified the result in United States v. Wunderlich, 342 U.S. 98 (1951).

Inc., 373 U.S. 709, 715 (1963). However, the decision of the Contract Appeals Board is not reviewable under the Administrative Procedure Act of the District of Columbia. Gunnell Construction Co. v. Contract Appeals Board, 282 A.2d 556 (D.C.C.App. 1971). Judge Nebeker stated (at p. 558): "Where the result reached by the Board does not satisfy the parties concerned they are left with the traditional remedies at law and any questions of contractual rights should be resolved in a suit on the contract." And so in case of a dispute arising under the contract where the claim is made for money due pursuant to its provisions, the party may bring a suit on the contract, which the court will determine on the basis of whether there was substantial evidence to support the Board's findings. However, when the claim is for breach of contract, and not a dispute arising under the contract, the court provides an independent judicial determination. United States v. Utah Construction Co., 384 U.S. 394 (1966). *Utah* also sets forth that if a "breach" claim overlaps a "dispute arising under the contract," any matter litigated before the Board in regard to dispute arising under the contract is to be determined on the "substantial evidence" Wunderlich Act standard, and is not to be relitigated de novo in court.

B

This is general learning and background. What plaintiff says is that the principle of limited judicial review is not applicable at all in the case of a serious defect in the establishment and procedures of the Board of Contract Appeals.

Where there is such a defect in the organization and operation of a board of contract appeals, it does not have minimum objectivity, and the Wunderlich limitation may not govern the court hearing the contract action. The Supreme Court has stated "on several occasions that

the parties will not be required to exhaust the administrative procedure if it is shown by clear evidence that such procedure is 'inadequate or unavailable.' It may be that the contracting officer or the Board of Contract Appeals so clearly reveals an unwillingness to act and to comply with the administrative procedure in the contract that the contractor or supplier is justified in concluding that those procedures have thereby become 'unavailable.'" United States v. Grace & Sons, Inc., 384 U.S. 424, 429-30 (1966) (citations omitted). *See, e.g.*, Baltimore Contractors, Inc. v. United States, No. 272-70, Order of Trial Judge Spector, at 4 n.5 (Ct. Cl., Trial Div., June 17, 1975), referring, *inter alia*, to a complaint that board members shared a small office with an attorney for the contracting officer.

C

Plaintiff sought to present an issue of that kind in regard to the Board of Contract Appeals of the District of Columbia. This contention was not considered by the trial judge. He referred to the doctrine that federal court jurisdiction premised on a federal question must appear on the face of a well-pleaded complaint.[7] The trial judge held that plaintiffs constitutional claim "must fail for want of jurisdiction since the claim was not properly pleaded as a matter of form."

In my view, this was error. This was not a case of federal question jurisdiction, but a case of simple jurisdiction of any contract claim involving more than $50,000 (see note 2). In accordance with *Gunnell*, plaintiff brought a suit on the contract. It was only when the District relied on a defense of finality that plaintiff had need to advance his constitutional claim to undercut that defense. This rebuttal did not have to be pleaded on the

[7] C. Wright, Law of Federal Courts 59-62 (2d ed. 1970). *See*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 390-95 (1971). Bell v. Hood, 327 U.S. 678, 681 (1946).

face of the complaint. The same considerations apply to plaintiff's claim that, apart from any constitutional requirement, the plaintiff is not bound by the Board decision in view of the requirement by implication from the Wunderlich Act of a disputes clause board and procedure that satisfy minimum Wunderlich Act requirements.

D

That brings us to a consideration of the plaintiff's claim of unfairness. Appellee District argues that any complaint about the structure and composition of its Contract Appeals Board is frivolous.

Plaintiff's papers attack the composition of the Board of Contract Appeals of the District of Columbia on the ground that it is "indefensible" to provide for resolution of a contract dispute by two lawyers of the Corporation Counsel's staff, and another contracting officer.

It is commonplace for Federal agencies and departments to draw heavily on the general counsel's office to staff members of boards of contract appeals.[8] It is fair to assume that this fact alone would not undercut the Wunderlich Act, especially since the *Bianchi* ruling did not advert to the dissent of Justice Douglas and his reference to "subnormal administrative procedures," 373 U.S. at 721.

However, plaintiff identifies a problem not generally applicable to Federal agencies, that the D.C. Corporation Counsel is actively engaged in contract litigation, which in the Federal Government is the responsibility of a separate department (Justice), and that the D.C. Cor-

[8] *See*, passim, H. C. Petrowitz, Report prepared for the Senate Select Committee on Small Business, Operation and Effectiveness of Government Boards of Contract Appeals, S. Doc. 99, 89th Cong. 2d Sess. (1966). Professor Petrowitz's study is cited in S & E Contractors, Inc. v. United States, 406 U.S. 1, 17-18 (1972).

poration Counsel was at one and the same time both defending against Jonal's claim and prosecuting a claim of the District against Jonal for liquidated damages (Br. 17).

Moreover, counsel for the District advised the court at oral argument that the District considers itself free under its regulations to permit the Corporation Counsel not only to assign members of his staff to the board, but to make such assignment, on a part-time duty basis, in such a way that on one day a lawyer may be a member of the board, sitting as a judge in a case tried by another member of the staff of the Corporation Counsel, although the day before and the day after he may be working alongside that colleague, or even under his supervision, in another matter.

Appellee says the Supreme Court in Marcello v. Bonds, 349 U.S. 302 (1955), has already upheld the constitutionality of deportation hearings by inquiry officers who are under the general supervision of a district or regional office. Deportation hearings have special tradition and requirements, due to exigencies of volume and location. Moreover, they are subject to a full administrative review by a national board of immigration appeals, staffed by members who are not subject to other assignment within the Immigration and Naturalization Service, and it is only that board's independent evaluation of the evidence that is entitled to "substantial evidence" deference by the courts.[9] In *Marcello*, the Court was able to thrust

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[9] *See* 1 C. Gordon and H. Rosenfeld, Immigration Law and Procedure § 1.10, at 1-51, 1-59 (Rev. ed. 1975):

> Since 1939 the Board has been completely apart from the Immigration and Naturalization Service. It is a separate body in the Department of Justice, responsible only to the Attorney General, which reviews the determinations of immigration officers. Under the present allocation of responsibilities the Board is divorced from the enforcement apparatus and it is a quasi-judicial body with exclusively appellate functions.
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> * * *
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> The Board thus can make its own independent determinations on questions of fact and law, and on whether discretionary relief should be granted. However, the Board will take into account that the special inquiry officer is primarily the trier of the facts with a better opportunity to assess credibility, and ordinarily will not alter his factual determinations. The Board's decisions are subject to . . . limited judicial review. . . .

The functions of the Board, as described by its chairman, see Finucane, Procedure before the Board of Immigration Appeals, 31 Interpr. Releases 26, 30 (Common Council for American Unity, 1954):

> If the case presents an issue as to the credibility of witnesses, due consideration is always given to the conclusions reached by the Special Inquiry Officer who had the witness before him, but the Board is in no sense bound by the findings of the Special Inquiry Officer even if supported by competent and substantial evidence. In a word, the Board may make a de novo review of the record and makes it conclusions and findings irrespective of those made by the Special Inquiry Officer.

The Supreme Court has held that although the board was established by the Attorney General, and not by statute, the Attorney General is bound by his own regulations, which require that the decisions of the board reflect its own independent judgment and not the dictate of the Attorney General. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[10] American Telephone & Telegraph Co. v. FCC, 449 F.2d 439, 455 (2d Cir. 1971).

aside a claim that prejudgment affected the hearing inquiry by stressing that the board of immigration appeals had been insulated (pp. 313-14).

Except for INS cases, the only application of the *Marcello* doctrine has been in the domains of rule-making,[10] which is poles apart from specific contract determination.

Moreover, I do not base my approach on constitutional grounds—or a lack of power in the legislature to prescribe a certain procedure even though lacking in optimum fairness. In the present case the legislative intent is not specifically delineated, as was the deportation legislation reviewed in *Marcello*, and there is room for the application of the doctrine that the legislature will be presumed to have contemplated procedures and organization that comport with basic fairness as discerned in the light of contemporary standards.[11]

The problem cannot be dismissed by saying that the same agency can combine prosecutorial and adjudicatory functions. An agency thus constituted may be called on to provide some separation during the course of adjudication. I do not say that the board as constituted is inadequate; I merely say that there is an issue that requires ventilation, as to how it works.

The District Court took note of the constitutional issue raised by plaintiff, but did not refer to the statutory issue—whether the board as constituted and operated was the kind of board that the Wunderlich Act had in mind as entitled to the "substantial evidence" rule. There are legislative-type recommendations that the boards of contract appeals should be restructured in the direction of complete separation from contracting officials and the general counsel's office.[12] But even assuming no change in

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[11] Thompson v. Washington, 162 U.S.App.D.C. 39, 52, 497 F.2d 626, 639 (1973).

[12] *See* H. C. Petrowitz, Report prepared for the Senate Select Committee on Small Business, Operation and Effectiveness of Government Boards of Contract Appeals, Sen. Doc. 99, 89th Cong. 2d Sess. 148-49 (1966): "*Board independence.* Boards of contract appeals should be as independent of contracting and legal activities of the agencies within which they are established as possible. Only by doing this will the necessary confidence in their objectivity be developed. This means that board members should not be organizationally

statutes, the question is to what extent the Wunderlich Act gives boards drawn from offices of general counsel and contracting officers full "substantial evidence" deference if there is day-to-day intermeshing of duties and varied working relationships with the officials presenting particular claims.

In my view, the case should be remanded so that the district judge may conduct a hearing that would flesh out how the board operates, and the working relations of members of the board to other employees in the Office of the Corporation Counsel, before he proceeds to decide whether, and to what exent, its decisions are entitled to the benefit of the "substantial evidence" rule.

E

The District Court alluded, without a ruling, to the possibility of estoppel.[13]

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associated with contracting offices, procurement policy offices, or the office of general counsel, which in most agencies has the responsibility of defending against claims before the boards. No matter how carefully an agency may try to isolate board members from the other activities within the office of general counsel, having the board organizationally within that office inevitably casts a shadow on its independence."

The Report of the Commission on Government Procurement (1972) recommended that agency boards of contract appeals be retained "as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence. * * * Agency boards would be more objective if all members of the boards were selected in a manner that minimized their ties to the agency head. This would be achieved if they were chosen in the same manner as hearing examiners under the Administrative Procedure Act." (vol. 4, pp. 20, 21) The Commission also recommended that contractors be given the option of direct access to the courts (*id.*, p. 23).

[13] "In view of the fact that Jonal submitted to the jurisdiction of the Board without constitutional challenge it is

The mere fact that Jonal exhausted a non-judicial remedy is not an estoppel on Jonal to claim that the non-judicial ruling is not conclusive on the court in the contract suit. The doctrine of primary jurisdiction may require exhaustion of a non-judicial remedy even when there will be no application of the "substantial evidence" rule.[14] For years prior to *Bianchi*, contractors first prosecuted appeals to boards of contracts appeals, and then obtained independent review in the Court of Claims. This remedy is still open as a "fail safe," when the board remedy is marred.

As for the claim that plaintiff is estopped for failure to present its challenge to the board, I do not see how an estoppel doctrine could be operative if the board was in no position to remove the problem of domination by the Corporation Counsel of which plaintiff complained. That condition inheres in the regulations binding on the board. Plaintiff's contention did not mean that the board, established pursuant to the regulations, had to cease forthwith. It had a role in making the record, assuming no procedural irregularity, and in screening out the need for court litigation in those cases where even such a board would conclude that the contracting officer had failed to make the equitable adjustment promised by the contract.

It would have been better procedure for plaintiff to state its position to the board. And its failure to do so might weaken its position to maintain certain contentions —a point I need not now crystallize. It suffices here to say it was not completely precluded from presenting an attack on the nature of the board in support of a claim that its decision was not entitled to the benefit of the "substantial evidence" rule.

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open to question, as the District has suggested, whether Jonal is not now estopped to raise that issue."

[14] Wheelabrator Corp. v. Chafee, 147 U.S.App.D.C. 238, 248, 455 F.2d 1306, 1316 (1971).

I dissent from the failure to require the district court, on remand, to consider the questions identified in this opinion in order to determine whether *Wunderlich's* "substantial evidence" principle is operative. Assuming that principle is operative, I concur in the court's order of remand, which accepts an alternative presentation of appellant, to assure there has been full submission on the sufficiency of the evidence on the whole record, and a considered ruling identifying whether there is substantial evidence supporting the decision of the board of contract appeals.[15]

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[15] The district judge provided only a conclusory recital that there was substantial evidence supporting the Board's disposition, without a single reference in his opinion, which discusses other issues in some depth, to a single item of the underlying evidence, nor even a bare citation to an exhibit or page transcript.

RECEIVED
APR 1 1976
CLERK OF THE UNITED
COURT OF APPEALS

EXHIBIT B

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 74-1191

JONAL CORPORATION, APPELLANT

v.

DISTRICT OF COLUMBIA

Appeal from the United States District Court
for the District of Columbia

(D. C. Civil Action 656-73)

Decided and judgment entered March 18, 1976

PETITION BY APPELLANT, JONAL CORPORATION, FOR REHEARING

and

SUGGESTION FOR HEARING OR REHEARING IN BANC

Petitioner, Jonal Corporation, hereby petitions this Court for a rehearing of the above-captioned appeal upon the grounds:

1. That this Court seemed to overlook or to misapprehend the posture of the case in the court below and the duty of that court in performing its function of determination of Jonal's obligation *vel non* respecting the work it said was not called for by its contract with the District, which the trial court did not fulfill.

2. This Court, as well as the court below, seems not to have applied the appropriate standards pertaining both to the raising and to the determination of the issue of depriving Jonal of its property without due process of law in contravention of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

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1. Jonal's complaint filed when the District Court still possessed its dual jurisdiction over civil actions exceeding the sum of $50,000.00 asserted, among other things, that the defendant-appellee-District had required Jonal to perform work not included in the District's plans and specifications.[1]

The Third Defense of the District alleged that the issues raised in Jonal's complaint were the subject of hearings before the District's Contract Appeals Board which issued findings of fact and conclusions of law in

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[1] Jonal's complaint was in full compliance with *Gunnell Construction Co. v. Contract Appeals Board for D.C.*, 282 A.2d 556 (1971), in which the Court said that "[w]here the result reached by the Board does not satisfy the parties concerned they are left with the traditional remedies at law and any questions of contractual rights should be resolved in a suit on the contract."

this matter, "which are based on substantial evidence in the record and as such are final."

As the court below clearly had its general jurisdiction which the District itself recognized in its Second Defense, there was no need for Jonal to allege a Federal or Constitutional question jurisdiction in the notice pleading. Such question would come up when the trial was had on the issues raised by the complaint and answer. The Federal Rules of Civil Procedure did not require Jonal to respond to the District's answer.

Whether the "extra" work Jonal was compelled by the District to perform was called for by the contract involved a construction or interpretation of it and was a question of law. Such question was one for decision by the court below upon its *de novo* construction or interpretation of the contract, which meant of all the contract documents. There was no dispute over the fact of what work the District demanded be done by Jonal. *Kayfield Construction Corp. v. United States,* 278 F.2d 217 (2nd Cir., 1960); *J. Langenfelder & Son, Inc. v. United States,* 164 Ct. Cl. 465, 341 F.2d 600 (1965); *Vann v. United States,* 190 Ct. Cl. 546, 420 F.2d 968 (1970); *Northwestern Industrial Piping, Inc. v. United States,* 199 Ct. Cl. 540, 467 F.2d 1308 (1972); *H&M Moving, Inc. v. United States,* 204 Ct. Cl. 696, 499 F.2d 660 (1974).

The District moved for summary judgment and in essence relied upon the finality of the Board's decision as to the facts and the law.

Subsequently, Jonal moved for summary judgment, raising the issue that the District Court should *preliminarily decide* whether Organization Order No. 9 of the Commissioner establishing the Board and

prescribing its constituency on its face violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America; and the further issue as to the finality to be accorded the decision of the District's Contract Appeals Board.

Instead of simply denying Jonal's and the District's motions for summary judgment and then proceeding to a hearing to determine independently and uninfluenced by the Board's conclusion of law as to whether the work Jonal was compelled to do by the District was required by the contract or not, the District Court *reviewed* the whole administrative record[2] and *found* that the Board's decision was based on substantial evidence, was not arbitrary or capricious and ordered the granting of the District's motion (App. 20), from which Jonal appealed to this Court.

Jonal has never received the 41 USC 321 and 322 (Wunderlich Act) hearing before the court below and *a fortiori* before this Court to determine whether Jonal was required as a matter of law to perform the work it said was not within its contract. The majority's remand and the remand referred to in the partially dissenting opinion will simply continue that error in deprivation of Jonal's rights to at least a hearing on the legal questions. As the matter stands, a mere *pro forma,* perfunctory, or self-executing action will follow below, and Jonal would be required again to appeal to have at some time a representative court hearing, at which Jonal could present its reasons why the contract did not require it to do at its expense the extra work the District demanded it perform.

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[2] In fact, the whole contract was not even before the trial court, i.e., the specifications.

At the very least, the mandate should have instructed the court below to hold a hearing and to permit Jonal to argue the merits of its case on the law as above outlined.

2. The Due Process Clause of the Fifth Amendment to our Constitution applies in the District of Columbia and to the District of Columbia, a municipal corporation. The real focus as well as thrust here of that Clause is upon forbidding Jonal's being deprived of its property without due process of law.

Using the test of the knowledgeable contractor, which appears in the majority and in the concurring opinion, and assuming that Jonal had full knowledge as to the law, what would it as a bidder have known? In bidding on an Invitation for Bids issued as a public offering by the District of Columbia, Jonal would understand that the legal question of whether it had to do work not called for by the District without any compensation therefor could not be determined finally even in the District's adhesion contract by its adhesion Board, and Jonal would have expected that under 41 USC 322 the Board's conclusion of law would not be of any effect on a later court action; further, that the Board's factual findings would be subject to a court's scrutiny as to whether they were truly findings of fact and thereafter whether they passed muster under 41 USC 321.

In applying the Wunderlich Act test, Jonal would have noted that the District had in its Disputes Clause by deleting the words "of fact" contained in the Federal Standard Form of Disputes Clause attempted to arrogate to itself finality as to legal questions,[3] contrary

[3] *United States v. Holpuch*, 328 U.S. 234 (1946); *United States v. Moorman*, 338 U.S. 457 (1950).

to 41 USC 322. In so doing, the knowledgeable contractor, Jonal (equated to the proverbial prudent and reasonable contractor), would have mused that the District's Disputes Clause in running afoul of a Federal statute, 41 USC 322, which this Court holds is applicable to the District's contracts[4] might not be enforceable at all in a court of the United States.

Jonal also might have thought that if the mere signing of the contract had the effect attributed to it by the concurring opinion, then the language of the Court of Claims in *Barlow v. United States*, 35 Ct. Cl. 514, 545 (1900), modified in amount and aff'd, *U. S. v. Barlow*, 184 U. S. 123 (1902), would have been apt:

> "If the full intent and effect be given to this provision which the defendants now ascribe to it, the contractors might as well have written an agreement on half a sheet of paper, binding themselves to perform whatever work and furnish whatever material the Chief of the Bureau might require, and accept therefor whatever remuneration the Secretary of the Treasury might be pleased to give them."

On the other side of the coin, Jonal knew that as a bidder it must take the bid package as the District offered or lose the work, and such was beyond the outer limits of voluntary choice. Jonal knew that no qualification could have been made in its bid without making the bid non-responsive. There was no arms-length bargaining or any bargaining by parties of equal strength.[5] Under those circumstances, with the

[4] Cf. also, D.C. Code 49-301 (1967 ed.)–All general Acts of Congress not locally inapplicable in the District of Columbia.

[5] Cf. *D.H. Overmyer v. Frick Co.*, 405 U.S. 174, 185 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 94 (1972); *United States v. Harvey*, 104 WLR 509, March 29, 30, 1976, and cases cited, pp. 522, 523.

intense competition for work and for survival in the construction industry, may it really be said that Jonal, by signing the adhesion contract, waived its right to complain of the District's demand for work not within the contract and at Jonal's expense, without reminding ourselves of the resounding words in history, "Let them eat cake."

As to the time and place of raising the Constitutional issue, there was no explication in the opinions of this Court of any alleviating action which the Board could give or would take if Jonal had then raised the matter of the composition of the Board as not a due process board under the Due Process Clause of the Fifth Amendment. The Board's composition was not one in which upon objection a member could rescue himself and the Board could then be reconstituted so as to correct or to remove the objection. The Board could not self-destruct in whole or in part, because it was not self-created.

What Jonal raised in the court below was the Constitutional issue respecting Organization Order No. 9,[6] over which the Board had no authority, promulgated by the then supreme authority of the District, namely, the Commissioner of the District of Columbia. In *Gunnell, supra,* the District of Columbia Court of Appeals said:

> "The Board is a body which was created by order of the Commissioner of the District of Columbia. It currently owes its existence to Part IV of Commissioner's Organization Order No. 9, June 6, 1968, as amended. *See* D. C. Code 1967, Title 1, Appendix at 74 (Supp. IV, 1971). As a

[6] Partially dissenting opinion, page 2, footnote 5.

> creature of the Commissioner, the Board does not have administrative procedural independence, but is subject to the control of the Commissioner. The Board cannot be said to be an 'independent agency' as that term is defined by the District of Columbia Administrative Procedure Act. The definition of 'subordinate agency' requires that a board or agency within that definition must administer laws or rules adopted under the authority of law. The Board does not function in such a manner but, by delegation of the Commissioner, acts as his agent in the narrow area of settling contract disputes with the District of Columbia. The Board is no more than a reviewing unit in the office of the Commissioner and does not administer laws in the sense that an administrative agency does within the contemplation of the Administrative Procedure Act."

Thus it may be seen that the deprivation proceeding cases relied on by the majority opinion are *sui generis,* with successive tiers in the decisional process which may not be equated to the Board here, as observed in the partially dissenting opinion.

Nothing seems to appear in any of the opinions of this Court in this case which indicates that the due process question, if raised, would or could cause the Board to reconstitute itself to remove the objection to its composition. Jonal could scarcely expect that the Board would or could violate the very precept of its being.

Furthermore, if Jonal raised the question and the Board overruled objection to its composition, should Jonal have refused to continue and thus have run the risk of having failed to exhaust the contractual remedy? *United States v. Holpuch, supra.* If Jonal, after such

objection, proceeded with the hearing before the Board, was it to be met later with the waiver defense?

To have the effect of waiver attributed to Jonal by the panel opinions, should there not have been at least a modicum of meaningful action or relief by the tribunal before which Jonal appeared? Should the contractor be obliged to perform a vain or futile act else lose its right to complain of the deprivation of its property without due process of law?

As above noticed, the opinions of the panel seem to hold that somewhere in its notice pleading invoking the general jurisdiction of the District Court, which did not rest on a Federal-question allegation, such Federal or Constitutional question should have been alleged by Jonal. As stated, with deference it is believed there was no requirement of such assertion in Jonal's complaint in the District Court which had full jurisdiction to determine the Constitutional issue or question when it arose through the District's motion for summary judgment and Jonal's response by its motion for summary judgment properly placing in focus and raising the Constitutional issue about Organization Order No. 9.

In the court below and here, Jonal's case has been thrown into the vortex of procedural swirls which have taken it off its true course.

SUGGESTION OF HEARING OR REHEARING IN BANC

Jonal suggests that the issues on this appeal be heard or reheard by this Court in banc. Such issues have prospective significance in view of the recurrence

thereof in the large procurement of the District of Columbia continuing into the indefinite future.

If the bureaucratic absolutism in the very practical field of construction under an adhesion contract, apparently sanctioned by the panel, is to prevail, and contractors under the District's "Disputes Clause" must continue with claimed extra work as ordered and at their own expense, or face default, with little or no available or really effective remedy, then high contingency factors in bids will have to be saddled on the public.

In addition to the "legislative-type recommendations" as to the structure of contract appeals boards quoted in the partially dissenting opinions, page 10, footnote 12, Jonal invites the attention of the Court to the back cover page of *Judicature*, the Journal of the American Judicature Society, for December 1973, Vol. 57, No. 5, on which these words appear:

> " 'It . . . is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' Lord Hewart, 1921."

There is a judicial public policy involved in the issues raised by this appeal warranting a hearing or rehearing in banc.

Respectfully submitted,

John F. Myers
Kahl K. Spriggs
1000 Sixteenth Street, N. W.
Washington, D. C. 20036
Tel.: 628-1501

Attorneys for Appellant-Petitioner,
Jonal Corporation

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Petition by Appellant, Jonal Corporation, for Rehearing and Suggestion for Hearing and Rehearing in banc, was mailed this 1st day of April, 1976, to Louis P. Robbins, Esquire, Acting Corporation Counsel for the District of Columbia, District Building, Washington, D.C. 20004, Attorney for Appellee.

John F. Myers

Attorney for Appellant-Petitioner,
Jonal Corporation

No. 74-1191 Civil Action 656-73
U.S. Court of Appeals
for the District of Columbia Circuit
FILED APR 21 1976

EXHIBIT C

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 74-1191 September Term 1975

Jonal Corporation, Civil Action 656-73
Appellant

v.

District of Columbia

Before: Leventhal and Robb, Circuit Judges; Merhige* U.S. District Judge for the Eastern Disctrict of Virginia.

O R D E R

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition for rehearing be, and it hereby is, denied.

Per Curium

For the Court:

GEORGE A. FISHER
Clerk

EXHIBIT D

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 74-1191 September Term, 1975

Jonal Corporation, Civil Action 656-73
Appellant

v.

District of Columbia

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

Appellant's suggestion for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* be, and it hereby is, denied.

Per Curiam

For the Court:

United States Court of Appeals
for the District of Columbia Circuit
FILED
APR 21 1976
GEORGE A. FISHER
CLERK

GEORGE A. FISHER
Clerk

RECEIVED
APR 27 1976
CLERK OF THE UNITED
STATES COURT OF APPEALS

EXHIBIT E

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 74-1191

JONAL CORPORATION, APPELLANT

v.

DISTRICT OF COLUMBIA

Appeal from the United States District Court
for the District of Columbia

(D. C. Civil Action 656-73)

Decided and judgment entered March 18, 1976

MOTION FOR STAY OF MANDATE
PENDING APPLICATION
TO THE SUPREME COURT OF THE UNITED STATES
FOR A WRIT OF CERTIORARI

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure and Rule 29 of this Court's Supplement to such Rules, appellant, Jonal Corporation, moves the Court for stay of the mandate for 45 days from April 21, 1976, or, alternatively, for

30 days from such date pending application by Jonal Corporation to the Supreme Court of the United States for a writ of certiorari from the judgment entered herein March 18, 1976, and states as follows:

1. Timely petition for rehearing and suggestion for rehearing in banc was filed by appellant on the 1st day of April, 1976, which was denied by this Court on April 21, 1976. The instant motion is filed within 7 days from April 21, 1976.

2. The additional time of 15 days is needed because of press of other litigation at this time of year and the need to have the petition prepared and in the hands of the printer within sufficient lead time to insure filing within the 45-day period.

John F. Myers
Kahl K. Spriggs
1000 Sixteenth Street, N. W.
Washington, D. C. 20036
Tel.: 628-1501

Attorneys for Appelant

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Motion for Stay of Mandate Pending Application to the Supreme Court of the United States for a Writ of Certiorari was mailed this 27th day of April, 1976, to Louis P. Robbins, Esquire, Principal Assistant Corporation Counsel for the District of Columbia, District Building, Washington, D. C. 20004, Attorney for Appellee.

John F. Myers

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 6 1976
GEORGE A. FISHER
CLERK

EXHIBIT F

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 74-1191 September Term, 1975

Jonal Corporation, Civil Action 656-73

Appellant

v.

District of Columbia

Before: Leventhal and Robb, Circuit Judges and Merhige*, United States District Judge for the Eastern District of Virginia

ORDER

On consideration of appellant's motion to stay mandate, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment to and including May 27, 1976.

Per Curiam

For the Court:

George A. Fisher, Clerk

By:
Robert A. Bonner
Chief Deputy Clerk

FILED
NOV 27 1973
CLERK, U.S. DISTRICT COURT

EXHIBIT G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JONAL CORPORATION	:	
	:	
v.	:	Civil Action No. 656-73
	:	
DISTRICT OF COLUMBIA	:	

MEMORANDUM AND ORDER

This controversy is before the Court on defendant's motion for summary judgment. For reasons set out hereinafter, the Court finds that defendant's motion should be granted.

I.

Plaintiff Jonal Corporation (Jonal) is a Maryland corporation doing business in the District of Columbia. On May 1, 1967, Jonal entered into a standard form government contract with defendant District of Columbia

(District). The contract, awarded after the customary competitive bidding process, involved the construction of certain water pollution control plant buildings for the lump sum of $297,000. D.C. Contract No. DCF-C-20-043. Subsequently disputes developed between the parties over the interpretation of hand-written notes appearing on certain drawings.

The District insisted upon completion of the work in accordance with its interpretation of those notes and Jonal now claims that such insistence materially increased its costs.[1]

The disputes were presented to the District of Columbia Contract Appeals Board (the Board) which decided adversely to Jonal. Jonal has filed suit in this Court on the original contract.

Jurisdiction is premised upon D.C. CODE ANN. §11-501(4) (1973), since the amount in controversy exceeds $50,000.

II.

Since the contract claims in the case at bar were decided by the Board adversely to the plaintiff's interest, the District has moved this Court that it is entitled to judgment as a matter of law since there is no genuine issue of material fact. To achieve the desired result the District asks the Court to adopt the standard of judicial review required by the Wunderlich Act, 41 U.S.C. §§321-22 (1970).

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[1] Jonal alleges (a) it was required to erect two water pollution control plant buildings to a height allegedly higher than that called for by the specifications at a cost of $6,491; (b) it was required to do paving work not called for by the contract at a cost of $25,635.13; and (c) the additional work delayed final completion with a resulting extra cost of $30,000. Finally Jonal claims a $9,600 unpaid balance on the contract.

In opposition to the District's motion for summary judgment the plaintiff has filed a "counter-statement of undisputed facts" which are not inconsistent with the District's statement of undisputed facts. Additionally, plaintiff has filed points and authorities in opposition to defendant's motion in which it asserts in substance that before addressing the Wunderlich question the Court must first decide whether the order establishing the Board and its makeup "on its face violates the Due Process Clause of the 5th Amendment to the Constitution."

III.

Taking the approach suggested by the plaintiff, the Court will first consider the constitutional issue.

As noted, the constitutional issue is newly injected into the case in plaintiff's opposition to the District's motion for summary judgment. At no point in the administrative proceedings nor in its complaint in this Court has the plaintiff raised the constitutional objection that the Board as established and constituted, violates the Fifth Amendment Due Process Clause.[2]

[2] For the authority establishing the present Board, *see* Organization Order No. 9, pt. VI, D.C. CODE ANN. §1-App. 235-36 (1973), effective June 6, 1968; *see also* Reorganization Plan No. 3 of 1967 §303, 3 C.F.R. 345 (Comp. 1967), 5 U.S.C. App. 588 (1970). The Board was first established by Reorganization Order No. 29, pt. VII, D.C.C.E. §1-App.II 125 (1966), effective September 17, 1953. The Board's membership, functions and authority have remained virtually unchanged since it inception. Thus, when Jonal entered into a contractual relationship with the District on May 1, 1967, it certainly was, or should have been, cognizant of the Board's membership, functions and duties. Mr. Justice Douglas, in another context, has stated: "Boards of contract appeals within the respective agencies today are common. They are not statutory creations but are established by administrative regulations. . . . Their decisions 'constitute administrative adjudication in its purest sense.' " S&E Contractors, Inc. v. United States, 406 U.S. 1, 17-18 (1972) (citations omitted).

The general rule, of course, is that federal court jurisdiction premised on a federal question must appear on the face of a well-pleaded complaint. *C. Wright, Law of Federal Courts* 59-62 (2d ed. 1970). *See Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 390-95 (1971). "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood,* 327 U.S. 678, 681 (1946). *Cf. District of Columbia v. Carter,* 409 U.S. 418, 432-33 (1973). Clearly, if the complaint fails to include any reference whatsoever to a federal question, then the court must in that case dismiss it for lack of jurisdiction. The corollary to that rule is set forth by Mr. Justice Black in *Bell v. Hood, supra,* 327 U.S. at 682:

> . . . (I)t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

In this instance, then, plaintiff's constitutional claim falls within the latter category, namely, that it must fail

for want of jurisdiction since the claim was not properly pleaded as a matter of form.[3]

This ruling of course does not vitiate plaintiff's claims under the contract. Accordingly, we turn to the application of the Wunderlich standards.

IV.

The Wunderlich Act prescribes the standards of review to be applied in cases involving "any contract entered into by the United States," 41 U.S.C. §321, and any "Government contract," 41 U.S.C. §322.

Under the Wunderlich standards a Court is not bound by the administrative agency's conclusions of law. The

[3] In passing the Court would note that Jonal is no stranger to government contracts. It secured the disputed contract through competitive bidding and pursued its dispute before the Board in full recognition of the fact that the contract disputes clause, Article 15 of U.S. Standard Form 23 contract (as modified for use by the District of Columbia), required all disputes to be referred to the Board "whose decision shall be final and conclusive upon the parties," subject of course to a review under Wunderlich standards. It would seem that Jonal, in anticipation of an adverse ruling on the Wunderlich issue, seeks now to inject the constitutional issue which might, if successfully pressed, bring about a trial *de novo* of all matters in dispute, thus accomplishing indirectly what Jonal might be unable to do directly. In view of the fact that Jonal submitted to the jurisdiction of the Board without constitutional challenge it is open to question, as the District has suggested, whether Jonal is not now estopped to raise that issue. "A waiver in any kind of a case, is an intentional relinquishment of an existing right." Van Bourg v. Nitze, 128 U.S.App.D.C. 301, 309, 388 F.2d 557, 565 (1967). Moreover, Jonal failed to raise any objection at the Board proceedings. *See, e.g.*, Cook Industries, Inc. v. Itol & Co., Inc., 449 F.2d 106 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Garfield & Co. v. Wiest, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

Court's review is limited, however, to the administrative record before it, and it may overturn the decision of an agency if it finds that the decision "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. §321. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 512-13 (1967); *United States v. Bianchi & Co.*, 373 U.S. 709 (1963). In other words, the reviewing court may not substitute its own independent judgment for that of the agency. After viewing the whole administrative record, the court must honor the agency's decision unless "it is alleged and proved that the administrative determination was arbitrary, capricious, or not supported by substantial evidence. . . ." *Crown Coat Front Co. v. Uniited States, supra*, 386 U.S. at 513. There is, then, no right to a trial *de novo*. *See S&E Contractors, Inc. v. United States, supra*, 406 U.S. at 18.

The issue here to be resolved, then, is whether this Court should apply Wunderlich review standards with respect to contracts entered into by the District of Columbia, since the Act itself as noted refers only to "any contract entered into by the United States," 41 U.S.C. §321, and "Government contract," 41 U.S.C. §322.

The Court finds that the law in this Circuit does in fact apply the Wunderlich substantial evidence test to contracts entered into by the District of Columbia. *Kenny Construction Co. v. District of Columbia*, 105 U.S.App. D.C. 8, 262 F.2d 926 (1959). *See also District of Columbia v. Heman Ward, Inc.*, 261 A.2d 836 (D.C. Ct. App. 1970).[4]

[4] With regard to substantial evidence test applied to District of Columbia Government agencies, *see* Association For Preservation of 1700 Block of N Street v. Duke, 123 U.S.App.D.C. 5, 356 F.2d

After a review of the whole administrative record, the Court finds that the District of Columbia Contract Appeals Board's decision was based on substantial evidence, and was not arbitrary or capricious.

V.

Accordingly, it is this 27th day of November, 1973, ORDERED that defendant's motion for summary judgment be, and the same is, hereby granted. *Fed. R. Civ. P.* 56(b); Local Rule 1-9(g).

H.F. CORCORAN

Judge

Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1688

JONAL CORPORATION,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a proceeding before the District of Columbia Contract Appeals Board denied petitioner, a contractor, fundamental fairness and due process of law simply because two of the Board's three members were Assistant Corporation Counsel for the District of Columbia and another Assistant Corporation Counsel presented the legal position of the District of Columbia Department involved in the contractual dispute tendered to the Board for resolution.

STATEMENT

In a complaint for money due filed in the United States District Court for the District of Columbia on April 4, 1973, petitioner allleged that on May 1, 1967, it entered into a contract with the District of Columbia for the construction of two water pollution control plant buildings for the sum of $297,000.00, that it was thereafter required by the District to construct the buildings to a greater height than that called for by the contract plans and specifications, and that it was required to perform certain paving work not included in the plans and specifications. Petitioner invoked the jurisdiction of the District Court under D. C. Code, 1973, § 11-501(4), and demanded judgment against the District of Columbia in the sum of $171,726.13. (Pet. App. 2a-4a, 15a, 45a.)

The District of Columbia answered the complaint and thereafter moved for summary judgment asserting that disputes arising out of contracts entered into by the District are reviewable by its Contract Appeals Board (hereinafter "CAB") under the standards prescribed by the Wunderlich Act (41 U. S. C. §§ 321-322), and that the District Court's review was restricted to whether the decision of the CAB, adverse to petitioner, was supported by substantial evidence. Petitioner opposed the motion for summary judgment, claiming that the CAB, as established and constituted, violated the Due Process Clause of the Fifth Amendment to the Constitution and also violated the Wunderlich Act. The CAB was created by order of the Commissioner of the District of Columbia. Each panel of the CAB consists of two Assistant Corporation Counsel and a third member who is employed by a District of Columbia Department other than that involved in the particular appeal. Petitioner claimed that, because the position of the Department involved in CAB cases is presented by another Assistant Corporation Counsel, CAB proceedings lack the fundamental fairness which the Constitution and the Wunderlich Act require. (Pet. App. 3a-5a, 15a-18a, 45a-46a.)

On November 27, 1973, the court entered summary judgment in the District's favor. In its memorandum and order, the court ruled that petitioner's procedural due process contention was "newly injected into the case in * * * [petitioner's] opposition to the District's motion for summary judgment." The court noted that "[a]t no point in the administrative proceedings nor in its complaint," did petitioner raise the "constitutional objection that the * * * [CAB,] as established and constituted, violates the Fifth Amendment Due Process Clause." The court accordingly concluded that petitioner's constitutional claim "must fail for want of jurisdiction since the claim was not properly pleaded as a matter of form." The court went on to conclude that, applying Wunderlich Act standards, the decision of the CAB "was based on substantial evidence, and was not arbitrary or capricious." (Pet. App. 46a-50a.)

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the District of Columbia Circuit. The Counrt of Appeals similarly observed that petitioner had presented its constitutional challenge in a dilatory manner, stating (Pet. App. 5a-6a) that:

> The * * * [District] argues, in support of the District Court's ruling, that * * * [petitioner's] procedural due process claim was belatedly proffered and improperly pleaded. This position has some justification. The Contract Appeals Board was established in 1953 and its composition, function and authority have remained essentially unchanged since its inception. * * * Yet, Jonal Corporation's constitutional objection to the Board's composition was not presented until after the contract containing the questioned grievance procedure had been knowledgeably executed in 1967 by its representative, the administrative procedure

> had been completely exhausted on the contract issues, the case had been filed and fully pleaded in the District Court, and the defendant had filed a motion for summary judgment. Since the constitutional defect is allegedly inherent in the grievance procedure, the plaintiff, in fairness, ought to have presented its position at an earlier stage of the process. * * * (Footnotes omitted.)

Nonetheless, the court held (id. at 6a) that it

> * * * need * * * not reach the issue of whether such a delay in presenting the claim operates to bar this Court from further considering the argument, for we conclude that * * * [petitioner's] procedural due process contention is lacking in substance.

The court went on the reject petitoner's related Wunderlich Act contention (id. at 9a-13a) but, upon considering petitioner's assertion that the District Court did not have the benefit of all portions of the administrative record in reviewing the decision of the CAB, the court concluded (id. at 13a) that:

> * * * In the interests of justice, * * * the case should be remanded so that the District Court, if it has not already done so, may consider all pertinent parts of the administrative record * * *.

Following the denial of a petition for rehearing and a suggestion for rehearing *en banc* (Pet. App 28a-40a), petitioner filed in this Court a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner advances no ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the

Rules of this Court. And see *Fields* v. *United States*, 205 U. S. 292, 296 (1907). Petitioner does not present a case involving a specific claim of bias or prejudice based on a tainted personal or pecuniary interest of a government official in a particular matter. Instead, petitioner attempts to structure a general bias *per se* argument around the performance by different attorneys employed by the Office of the District of Columbia Corporation Counsel of the presenting and adjudicating functions in CAB proceedings. As both lower courts noted, however (Pet. App. 5a-6a, 46a-47a), such an argument was not advanced until a late stage of the District Court litigation. Cf *Bell* v. *Hood*, 327 U. S. 678, 681-682 (1946). Both lower courts also noted (Pet. App. 5a-6a, 14a, 48a) that petitioner is no stranger to government contracts and agreed in advance to submit disputes to the CAB for decision with full knowledge of the composition, functions, and authority of the CAB.

The CAB, like its federal counterparts, is created by agency regulation rather than by legislative enactment. Its authority, as a reviewing unit in the Office of the Commissioner of the District of Columbia, derives solely from an order of the Commissioner. See Organization Order No. 9, D. C. Code, 1973, Title 1, Appendix, at 235-236. Its jurisdiction is contractual, arising as it does under Article 15 of the Contract in question (Petition at 6-7), which contains a "disputes clause" like that set forth in contracts enetred into by federal agencies. Like most of its federal counterparts, the CAB functions substitutionally as the representative or *alter ego* of the Commissioner of the District of Columbia, in the sense that its decisions are not reviewed by the Commissioner prior to their final issuance. See *Gunnell Construction Co.* v. *Contract Appeals Board*, 282 A. 2d 556 (D. C. App., 1971); compare S. Doc. No. 99, 89th

Cong., 2nd Sess., *Operation and Effectiveness of Government Boards of Contract Appeals,* at 20-21. *S&E Contractors, Inc.* v. *United States,* 406 U. S. 1, 17-18 (1972). Petitioner does not suggest that CAB decisions are in any manner subject to review by the Corporation Counsel, and its position in this respect is quite consistent with both Organization Order No. 9 and the Rules of Procedure under which the CAB operates. See 36 District of Columbia Register 23-24, Part 15. The decision of the Court of Appeals that the fundamental fairness mandated by procedural due process and the Wunderlich Act is not *ipso facto* subverted simply because a Board staffed by two Assistant Corporation Counsel resolves matters in which the contracting agency is represented by another Assistant Corporation Counsel conflicts with no decision of this Court or of any circuit court of appeals. Indeed, when the case is considered in light of principles articulated by this Court, it becomes readily apparent that petitioner has failed to present a question of gravity or general national importance sufficient to warrant the issuance of the extraordinary writ it seeks.

The administrative procedure of which petitioner complains is no less offensive than a procedure whereby the accusatory or prosecutive and the adjudicative functions are combined in members of the same government agency. Yet this Court has held with consistency that such a procedure, standing alone, does not violate due process. See *Withrow* v. *Larkin,* 421 U. S. 35 (1975); *Marcello* v. *Bonds,* 349 U. S. 302 (1955); *Fahey* v. *Mallonee,* 332 U. S. 245, 256 (1947).

In *Marcello,* this Court held (349 U. S. at 311) that a deportation hearing was not stripped of its impartiality simply because the presiding officer was subject to the supervision and control of officials charged with investiga-

tive and prosecuting functions. And as the Court of Appeals noted (Pet App. 8a), *Marcello*

> * * * has consistently been interpreted to stand for the general proposition that the combination in administrative procedures of judging with prosecuting or investigating functions is not, *per se,* a denial of due process. * * * (Citations omitted.)

More recently in *Withrow,* the plaintiff, a physician, sought to enjoin enforcement of a Wisconsin statute which gave the state medical examining board the power to suspend licenses after holding its own contested hearing. Although the hearing was a full adversary proceeding, the board not only initiated the charges leading to suspension but also conducted its own investigation and rendered a decision based on the evidence presented to it (421 U. S. at 46). In refusing to accept a bias *per se* theory analogous to that advanced here, this Court noted that there is a legitimate distinction to be drawn between cases in which an adjudicator has "a pecuniary interest in the outcome" or in which "he has been the target of personal abuse or criticism from the party before him" and cases in which an agency combines investigative or accusatory functions and adjudicative functions (421 U. S. at 47). In the latter instance, there is a "presumption of honesty and integrity in those serving as adjudicators" (id.) and the "processes utilized by the Board * * * do not in themselves contain an unacceptable risk of bias" (421 U. S. at 54). By parity of reasoning, the performance by different Assistant Corporation Counsel of the presenting and adjudicating functions at CAB proceedings does not, in and of itself, rise to the level of an arguable denial of fundamental fairness or due process sufficient to warrant an exercise of this Court's certiorari jurisdiction.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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